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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, *et al.*,

Plaintiffs,

v.

UNITED STATES OFFICE OF PERSONNEL
MANAGEMENT, *et al.*,

Defendants.

Case No. 3:25-cv-1780-WHA

**DEFENDANTS' NOTICE OF MOTION
AND CROSS-MOTION FOR SUMMARY
JUDGMENT; OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY
ADJUDICATION OF CLAIMS I-IV**

Hearing Date: August 28, 2025

Time: 8:00 am

Judge: The Hon. William H. Alsup

Place: San Francisco Courthouse

Courtroom 12

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INTRODUCTION

On January 20, 2025, President Trump instituted a hiring freeze of federal civilian employees and ordered certain agencies to identify ways to reduce the size of the federal government. Admin. Record (“AR”) 332–33. The same day, U.S. Office of Personnel Management (“OPM”) Acting Director Charles Ezell sent a memorandum to federal agencies, providing guidance “regarding critical potential personnel actions.” AR 335. The memorandum explained that “[p]robationary periods are an essential tool for agencies to assess employee performance and manage staffing levels.” *Id.* And it further instructed that agencies “should identify all employees on probationary periods,” and “should promptly determine whether those employees should be retained at the agenc[ies].” *Id.* Thus, the memorandum was consistent with OPM’s historical practice and statutory authority, which was to provide guidance to agencies regarding personnel matters. In this case, OPM provided guidance consistent with an Executive Branch wide effort to reduce the federal workforce. Ultimately, agencies decided themselves how they would comply with the President’s efforts to reduce the size of the work force, as some agencies chose to retain all of their probationary employees while others chose to terminate only certain probationary employees. Thus, the process embodied both an effort undertaken across the entire Executive Branch and one committed to the discretion of each individual agency. Indeed, OPM’s memorandum and subsequent guidance mandated no particular decision by any agency, and OPM revised its guidance to make abundantly clear that each agency had its own purview of whether to terminate an employee. AR 400–02.

Plaintiffs—a group of public sector unions, non-profit organizations, and the State of Washington—first came before this Court in February 2025 arguing that OPM issued a directive to agencies to terminate probationary employees. Plaintiffs now assert that they are entitled to summary judgment on claims that OPM’s action was: (i) *ultra vires*; (ii) in excess of OPM’s statutory authority under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–06; (iii) arbitrary and capricious under the APA; and (iv) a rule issued without the requisite notice-and-comment. *See* Pls’ Not. of Mot. & Mot. for Summ. Adj. of Claims I–IV, ECF No. 222 (“Pls.’ Br.” or “Brief”). While this Court initially granted Plaintiffs preliminary injunctive relief

1 on these claims, it is clear with the benefit of the administrative record that Plaintiffs' claims fail
2 on the record evidence and that Defendants are entitled to summary judgment.

3 At the threshold, Plaintiffs claims fail for lack of subject matter jurisdiction. The
4 Supreme Court held that the organizational Plaintiffs relied on a theory of downstream harm that
5 was insufficient to establish Article III standing, *see U.S. Off. of Pers. Mgt. v. Am. Fed'n of*
6 *Gov't Emps.*, 145 S. Ct. 1914 (Mem.) (2025), but all Plaintiffs lack standing. In addition, while
7 Plaintiffs assert that the parties have not yet argued Claim V of their Second Amended
8 Complaint, *see* Pls.' Second Am. Compl. ¶¶ 223–29, ECF No. 90 ("SAC"), relating to an alleged
9 requirement that federal employees submit email reports to OPM, Plaintiffs fail to allege any
10 kind of injury necessary for standing on this claim. Plaintiffs' Second Amended Complaint also
11 fails because their claims challenging personnel decisions related to federal employees are
12 channeled by statute through the Merit Systems Protection Board ("MSPB") or the Federal
13 Labor Relations Authority ("FLRA").

14 Even assuming that subject matter jurisdiction lies, Defendants are nonetheless entitled to
15 summary judgment on each of Plaintiffs' claims. Plaintiffs' *ultra vires* claim is not properly
16 brought against OPM as it simply mirrors Plaintiffs' APA claims, and Plaintiffs have not alleged
17 that either OPM's regulations or its statutory authority for promulgating these regulations are
18 themselves unconstitutional and has not alleged that those regulations directly prohibit OPM's
19 January 20, 2025, guidance.

20 Plaintiffs' APA claims also fail. Plaintiffs contend that OPM issued a directive to federal
21 agencies to terminate probationary employees that exceeded its statutory authority, but the
22 administrative record offers no support for this assertion. The record shows that OPM did not
23 direct federal agencies to terminate probationary employees and repeatedly stated that it would
24 not involve itself in the specifics of whether agencies did, or did not, terminate their probationary
25 employees. Plaintiffs also contend that OPM's actions were arbitrary and capricious, but OPM's
26 guidance had a rational basis for providing advice to agencies on how to carry out a broader
27 Executive Branch-wide effort to reduce the size of the federal workforce. Plaintiffs additionally
28 contend that the guidance constituted a legislative rule subject to a notice-and-comment

1 requirement, but OPM’s guidance was not “designed to implement, interpret, or prescribe law or
 2 policy or describing the organization, procedure, or practice requirements of an agency.” 5
 3 U.S.C. § 551(4).

4 Finally, even assuming this Court concludes that summary judgment for Plaintiffs on any
 5 claim is appropriate, Plaintiffs’ request for relief goes too far as it seeks to improperly entangle
 6 the Court in the specifics of each relief defendant agency’s personnel decisions—relief that this
 7 Court previously held was beyond its equitable powers.

8 This Court should thus deny Plaintiffs’ motion for summary judgment and grant
 9 Defendants’ motion for summary judgment; or at minimum, to conserve judicial resources, the
 10 Court may wish to await further guidance from the Ninth Circuit, which has scheduled oral
 11 argument for August 19 on the government’s appeals of the Court’s preliminary injunctions and
 12 will be poised to address the standing and jurisdictional issues presented here.

13 BACKGROUND

14 Historically, employees in the federal civil service have been subject to a probationary or
 15 trial period before conversion to permanent appointment, allowing agencies to evaluate a
 16 candidate’s potential to become a longer-term employee. AR 1–2, 4.¹ Under the current
 17 regulations propounded under the Civil Service Reform Act (“CSRA”), Pub. L. No. 95-454, 92
 18 Stat. 1111 (1978), codified in various sections of Title 5, United States Code, the first year or
 19 first two years for certain federal employees is a probationary or trial period. *See, e.g.*, 5 C.F.R.
 20 § 315.801, 315.802; AR 57. Those regulations further provide that employing agencies are to use
 21 the probationary period “as fully as possible to determine the fitness of the employee and shall
 22 terminate his or her services during this period if the employee fails to demonstrate fully his or
 23 her qualifications for continued employment.” *Id.* § 315.803(a). When an agency decides to
 24 terminate an employee covered by these regulations because his or her work performance or
 25 conduct during the probationary or trial period fails to demonstrate fitness or qualifications for
 26 continued employment, it must notify the employee and provide “the agency’s conclusions as to
 27

28 ¹ Additional statutory background information may be found in Defendants’ other briefs.
See, e.g., Defs. Opp’n to Pl.’ Wash. State’s Mot. for Prelim. Inj., ECF No. 167.

1 the inadequacies of his [or her] performance or conduct.” *Id.* § 315.804(a). However, various
 2 federal entities have issued reports and memoranda in recent years noting that agencies may not
 3 be fully using probationary periods to evaluate the fitness of probationary employees for
 4 continued employment. *See* AR 3–56, 60–116, 324–25.

5 As part of its role in “aligning human capital strategies of agencies with the missions,
 6 goals, and organizational objectives of those agencies[,]” 5 U.S.C. § 1103(c)(2)(A)(i), OPM has
 7 routinely provided agencies with guidance on how agencies should scrutinize probationary
 8 employees. In 2023, for example, then OPM Director Kiran A. Ahuja issued a memorandum
 9 whereby “OPM advise[d] agencies to periodically remind supervisors and managers about the
 10 value of the probationary period ... in order to make informed decisions about whether to retain
 11 an individual in the agency’s permanent workforce.” AR 324; *see also* AR 95 (recommending
 12 that “OPM ... take steps to help supervisors make effective use of the probationary period for
 13 new employees”).

14 As relevant to this case, on January 20, 2025, President Trump immediately took steps to
 15 optimize the size of the federal workforce and limit hiring to mission-critical positions. AR 332–
 16 33. To that end, the President issued an Executive Order ordering a hiring freeze and directing
 17 OPM, along with other government agencies, to “submit a plan to reduce the size of the Federal
 18 Government’s workforce through efficiency improvements and attrition.” AR 332. The
 19 Executive Order further directed “the heads of executive departments and agencies [to] seek
 20 efficient use of existing personnel.” AR 333.

21 Consistent with this Executive-wide plan to streamline the federal workforce, on January
 22 20, 2025, OPM Acting Director Charles Ezell transmitted to Executive Branch agencies a
 23 memorandum “providing ... guidance ... regarding critical potential personnel actions.” AR
 24 335–37. Much like prior OPM memoranda, the memorandum explained that “[p]ro probationary
 25 periods are an essential tool for agencies to assess employee performance and manage staffing
 26 levels.” AR 335. It then advised agencies to “identify all employees on probationary periods,”
 27 and to “promptly determine whether those employees should be retained at the agenc[ies].” *Id.*

28 As part of its role in providing guidance to the agencies, OPM fielded calls and emails

1 from agencies seeking additional OPM guidance on potential termination of probationary
 2 employees and navigation of the hiring freeze. *See, e.g.*, AR 359–63. Consistent with its statutory
 3 role, OPM repeatedly conveyed the position that termination decisions were up to the agencies.
 4 For instance, in February 11, 2025, emails with agencies, OPM Senior Advisor Noah Peters
 5 stated that such decisions were “up to each agency,” and that OPM did not “want to be in the
 6 weeds of [the agencies’] exemptions.” AR 357. Mr. Peters further clarified that “[a]gencies
 7 [were] responsible for exempting whomever they want—they are not required to exclude people.
 8 We have suggested possible categories of exemptions but are not requiring it.” *Id.*² Indeed, OPM
 9 took no issue with the U.S. Department of Justice exempting all of its probationary employees
 10 from termination. AR 359, 382, 386.

11 On February 12, OPM emailed agency chiefs of staff, noting that “agencies ha[d] worked
 12 to review, clean up, and finalize their lists of probationary employees and begin taking action.”
 13 AR 383. In light of these steps, OPM advised those chiefs of staff to partner with their agency
 14 Chief Human Capital Officers (“CHCOs”) to “action” those probationary employees that each
 15 agency “wish[ed] to separate” by the following day, February 13. *Id.*³ In this email, OPM further
 16 noted that agencies could “keep” probationary employees but asked that the agencies identify for
 17 OPM those employees in a probationary employee spreadsheet that OPM maintained. AR 384.
 18 Further, OPM advised that, in terminating employees, agencies had to “provide notice of
 19 performance deficiencies,” per relevant regulations on probationary periods. *Id.* That same day,
 20

21 ² Plaintiffs make much of the fact that OPM granted “exemptions,” as evidence that OPM
 22 was ultimately directing who agencies could and could not fire. *See* Pls.’ Br. at 5–6. However,
 23 the record highlights that agencies were giving notice of who they would and would not
 24 terminate in their “exemptions.” As a result, the “exemptions” discussed are better understood as
 25 agencies seeking to exempt certain employees from the broader Executive Branch priority to
 26 reduce the federal workforce and not from any decision by OPM. Crucially, the record does not
 27 show that OPM ever denied exemptions or ordered agencies to fire employees that the agencies
 28 wished to retain. While Plaintiffs cite this Court’s prior opinions to claim that there is a record of
 OPM denying exemptions, *id.* at 8 n.9, those opinions do not actually discuss “exemptions” or
 provide examples of denials. Instead, they involve examples of certain agency personnel
 individually concluding—without further agency corroboration of their personal opinion—that
 they were being ordered to terminated employees and had no choice in the matter. *See, e.g., Am.*
Fed’n of Gov’t Emps. v. OPM, No. 3:25-cv-1780, --- F. Supp. 3d ---, 2025 WL 660053, at *1–3
 (N.D. Cal. Feb. 28, 2025) (“*AFGE*”).

³ Contrary to Plaintiffs’ contention, *see* Pls.’ Br. at 3 n.4, this email is included in the
 administrative record. *See* AR 383–84.

1 OPM—by way of the CHCO Council—sent agencies a draft template letter for terminating
2 probationary period employees while once again noting that agencies would still have to
3 “identify performance or conduct deficiencies in the notice terminating a probationer[.]” AR
4 369–71.

5 On February 14, OPM sent an email to agencies to clarify the next steps regarding
6 probationary employees, as agencies themselves were “work[ing] to review, clean up, and
7 finalize theirs lists of probationary employees they wish[ed] to *keep*, and wish[ed] to terminate,
8 and begin taking action.” AR 375 (emphasis added). The email noted how agencies had been
9 notifying OPM of the employees that the agencies would exempt from termination, and OPM
10 reminded the agencies to provide an explanation for the exemption. *Id.* However, OPM left any
11 kind of termination decision to the agencies and reiterated that such decisions should be taken
12 “in light of the President’s directive to dramatically reduce the size of the federal workforce.” *Id.*
13 As with prior emails, OPM attached a “template letter” for reference but did not specifically
14 instruct agencies to use it. *Id.*

15 On February 24, the CHCO Council again emailed agency CHCOs and Deputy CHCOs,
16 noting that OPM had received numerous questions “[a]s agencies continue to make decisions on
17 whether to retain probationary employees[.]” AR 389. OPM provided a frequently-asked-
18 questions document “[t]o assist agencies in carrying out their decisions[.]” AR 389–94. In that
19 document, OPM advised agencies to engage in their own review of probationers’ continued
20 employment based on how a probationer’s performance was advancing the agencies’ mission.
21 AR 390 (asking “How should agencies evaluate the performance of an employee serving a
22 probationary or trial period?”). Following this lawsuit, OPM sought to reiterate, once again, that
23 termination decisions were up to individual agencies. Thus, on March 4, 2025, OPM issued a
24 revised guidance of its prior January 20 memo to clarify that “OPM is not directing agencies to
25 take any specific performance-based actions regarding probationary employees.” AR 400–02.
26 OPM emphasized that “[a]gencies have ultimate decision-making authority over, and
27 responsibility for, such personnel actions.” AR 400.

STANDARD OF REVIEW

“Generally, judicial review of agency action is limited to review of the record on which the administrative decision was based.” *Partridge v. Reich*, 141 F.3d 920, 926 n.4 (9th Cir. 1998) (quotation omitted). Furthermore, “[t]he court’s role on motions for summary judgment is not to resolve contested fact questions which may exist in the underlying administrative record, but to determine whether or not, as a matter of law, the evidence in the administrative record permitted the agency to make the decision it did.” *Ctr. for Biological Diversity v. Gould*, 150 F. Supp. 3d 1170, 1177 (E.D. Cal. 2015) (quotation omitted). The only exception applicable here is on standing as “a plaintiff moving the district court for summary judgment ... must either identify in that [administrative] record evidence sufficient to support its standing to seek review or, if there is none because standing was not an issue before the agency, submit additional evidence to the court[.]” *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). Because Plaintiffs bear the burden of proof with respect to standing, to obtain summary judgment they must establish that “there is no genuine dispute as to any material fact,” Fed. R. Civ. P. 56(a)—*i.e.*, they “must affirmatively demonstrate that no reasonable trier of fact could find other than” in their favor on the issue. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). Here, Plaintiffs acknowledge that the Court can decide the parties’ respective motions for summary judgment purely based on the administrative record and that there is no need for further factual development or proceedings. Pls.’ Br. at 2 n.3⁴; *see also Shah v. U. S. Citizenship & Immigr. Servs.*, No. 18-cv-1345, 2019 WL 6877929, at *3 (W.D. Wash. Dec. 17, 2019) (“Courts routinely resolve APA challenges to an agency’s administrative decision by summary judgment.”).

⁴ Plaintiffs assert that they are not challenging the administrative record so as to “avoid[] presenting unnecessary disputes to this Court.” Pls.’ Br. at 2 n.3. But by not challenging the sufficiency of the administrative record, Plaintiffs have therefore waived any contention that more factfinding is necessary. *Nasser-Urfi v. Att’y Gen. of U.S.*, 298 F. App’x 123, 124 (3d Cir. 2008) (finding party waived challenge to sufficiency of administrative record); *Stadnicki on Behalf of LendingClub Corp. v. Laplanche*, No. 3:16-cv-3072, 2018 WL 4110553, at *4 (N.D. Cal. Aug. 29, 2018) (“That [...] plaintiffs decided to forgo [a] claim is telling and further indicates ... the strategic choices made ...”).

ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Claims

A. Plaintiffs Lack Standing

At the threshold, Plaintiffs lack standing to maintain this lawsuit. To establish standing, a plaintiff must show: (i) an “injury in fact[,]” that is, a violation of a legally protected interest that is “concrete and particularized,” and “actual or imminent, not conjectural or hypothetical”; (ii) a causal connection between the injury and the defendant’s conduct such that the injury is “fairly ... trace[able] to the challenged action”; and (iii) that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotations omitted).

As the party invoking federal jurisdiction here, Plaintiffs “bear[] the burden of establishing these elements,” and therefore “must clearly ... allege facts demonstrating each element.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (internal quotations omitted). “[S]tanding is not dispensed in gross,” and “plaintiffs must demonstrate standing for each claim they press’ against each defendant, ‘and for each form of relief that they seek.’” *Murthy v. Missouri*, 603 U.S. 43, 61 (2024) (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021)).

As to the organizational Plaintiffs, the Supreme Court has already concluded that the alleged harm to those plaintiffs was too remote and that they lacked standing. *See Off. of Pers. Mgt. v. Am. Fed’n of Gov’t Emps.*, 145 S. Ct. 1914 (Mem.) (“*OPM*”) (“The District Court’s injunction was based solely on the allegations of the nine non-profit-organization plaintiffs in this case. But under established law, those allegations are presently insufficient to support the organizations’ standing.”). This Court also rejected the theory of standing advanced by the organizational plaintiffs when holding that the State of Washington does not have standing based on speculative, downstream injuries flowing from the disruption of certain federal services. *Am. Fed’n of Gov’t Emps. v. OPM*, No. 3:25-cv-1780, --- F. Supp. 3d ---, 2025 WL 1150698, at *12 (N.D. Cal. Apr. 18, 2025) (“*AFGE*”). Neither the organizational Plaintiffs nor the State of Washington have come forward with additional allegations or evidence that would warrant

1 revisiting this conclusion, so the Court’s holding on this theory of standing remains dispositive.

2 As to the union Plaintiffs and the State of Washington, Plaintiffs argue there is no need to
 3 revisit the Court’s prior rulings that those entities have standing. Pls.’ Br. at 1. However,
 4 “[s]tanding must ‘persist throughout all stages of [the] litigation.’” *Magadia v. Wal-Mart*
 5 *Assocs., Inc.*, 999 F.3d 668, 674 (9th Cir. 2021) (quoting *Hollingsworth v. Perry*, 570 U.S. 693,
 6 705 (2013)). Like the organizational Plaintiffs, the remaining Plaintiffs do not set out any new
 7 allegations or proffer other admissible evidence demonstrating that they have standing to
 8 maintain their challenge.

9 In initially holding that the union Plaintiffs had representational standing through injury
 10 to their members, this Court previously found standing based on the declaration of one Veteran
 11 Doe let go from the Foreign Agricultural Service. *See AFGE*, 2025 WL 1150698, at *9–10.
 12 However, the union Plaintiffs—despite this Court’s request that they substantiate their
 13 allegations of harm to members—have failed to identify terminated probationers from *each* of
 14 the relief Defendant agencies they have named that are union members. *See, e.g.*, Resp. to
 15 Court’s Inquiry Re: Union Members, at 2, ECF No. 199 (“the Public Sector Union Plaintiffs are
 16 unable to identify probationary employee members or to assemble a list of those members
 17 through a review of the membership records.”). Thus, the union members lack standing to obtain
 18 relief as to any of the relief defendant agencies for which they have failed to proffer sufficient
 19 evidence of injury. *See Murthy*, 603 U.S. at 61 (“standing is not dispensed in gross”) (citation
 20 omitted).

21 The union Plaintiffs also fail to establish an injury to their organizational mission. While
 22 this Court tentatively concluded that the union Plaintiffs established a cognizable injury based on
 23 the supposed reduction in union dues from terminated employees, *AFGE*, 2025 WL 1150698, at
 24 *10, Plaintiffs’ assertions are not supported by competent evidence. AFGE, for example, has
 25 boasted that it “stands at 321,000 dues-paying members, its highest level ever, and is on track to
 26 reach 325,000 dues-paying members by the end of the week.” Jory Heckman, AFGE Sees Surge
 27 in New Members as its Lawsuits Stall Trump’s Federal Workforce Policies, Federal News
 28 Network (Feb. 10, 2025), <https://perma.cc/F2KW-CKT2>.

1 The State of Washington also lacks standing to asserts the same downstream harms that
 2 the Supreme Court rejected in staying the initial preliminary injunction. *See OPM*, 145 S. Ct.
 3 1914 (Mem.). But, apart from an allegation of “financial injury” that Washington allegedly
 4 suffered by having to redirect resources to serve the unemployment insurance claims of
 5 terminated employees, *AFGE*, 2025 WL 1150698, at *13, this Court has already held that
 6 Washington lacked standing with respect to a number of alleged injuries, and Washington has
 7 come forward with no additional evidence of an injury. Defendants respectfully submit that
 8 Washington’s claim of financial injury is still insufficient given the Supreme Court’s decision in
 9 *United States v. Texas*, that “indirect effects on state revenues or state spending,” is still too
 10 “attenuated” to confer standing. 599 U.S. 670, 680 n.3 (2023). And while this Court suggested
 11 that *Texas* was cabined to standing based on the federal government’s prosecutorial decisions,
 12 *AFGE*, 2025 WL 1150698, at *13, the Ninth Circuit has read *Texas* much more broadly. Indeed,
 13 the Ninth Circuit rejected the state of Idaho’s standing based on allegations that “it w[ould]
 14 sustain economic injury in the form of downstream medical costs that will borne by the state.”
 15 *Washington v. FDA*, 108 F.4th 1163, 1175 (9th Cir. 2024). In doing so, the Ninth Circuit
 16 highlighted that this theory of standing was no different than the kind of “indirect effect on state
 17 spending,” rejected in *Texas*. *Id.* at 1176 (internal citation omitted). The State of Washington’s
 18 theory of indirect harm is no different that Idaho’s and insufficient to confer standing.

19 **B. Plaintiffs Lack Standing to Raise Their Fifth Claim for Relief**

20 Plaintiffs lack standing to maintain the fifth claim for relief. In their Brief, Plaintiffs only
 21 seek summary judgment on Claims I-IV and avoid discussing Claim V other than to briefly
 22 assert in a footnote that “[t]he AR prepared by OPM entirely ignores this claim.” Pls.’ Br. at 2
 23 n.2. As a preliminary matter, Plaintiffs have waived their ability to challenge the sufficiency of
 24 the administrative record. *See supra*, at 7 n.4. In any event, there is no need to resolve Claim V
 25 by reference to any administrative record because the Court lacks subject matter jurisdiction over
 26 this claim. As Plaintiffs recount in their brief, this claim “challenges OPM’s new requirement
 27 that each federal employee submit a weekly email to OPM detailing five things the employee did
 28 during the prior week.” Pls.’ Br. at 2; *see also* SAC ¶¶ 223–29. However, Plaintiffs cannot

1 establish standing to bring this tangential claim.

2 Plaintiffs assert an injury based on the claim that “[h]ad OPM followed notice-and-
 3 comment procedures required by the APA, Plaintiffs would have provided comments about the
 4 OPM Program.” SAC ¶ 223. While Plaintiffs thus raise a “procedural injury” claiming they were
 5 injured by OPM not “following notice and comment rulemaking,” the Ninth Circuit has held that
 6 “not every procedural injury will do” for the purposes of standing. *Yesler Terrace Cmty. Council*
 7 *v. Cisneros*, 37 F.3d 442, 445–46 (9th Cir. 1994). Rather, “[t]o have standing, a plaintiff must be
 8 seeking ‘to enforce a procedural requirement the disregard of which could impair a separate
 9 concrete interest.’” *Id.* (quoting *Defs. of Wildlife*, 504 U.S. at 572). Even assuming *arguendo* that
 10 OPM *required* federal employees to submit email reports to it, Plaintiffs do not allege or identify
 11 by competent evidence a separate concrete interest of theirs impaired. *See* Jonathan Landay,
 12 Joseph Ax, & Sarah N. Lynch, *Some US agencies tell workers not to reply to Musk’s ‘What did*
 13 *you do last week’ email*, Reuters (Feb. 24, 2025), <https://perma.cc/X2W7-WQVT> (recounting
 14 federal workers that were not required to submit email reports); *see also* SAC ¶ 186 (noting
 15 OPM’s post “that responding to any OPM mass email was ‘explicitly voluntary’”). Plaintiffs’
 16 SAC fails to allege any separate concrete interest that was harmed either by any supposed
 17 requirement by federal employees to submit email reports or by any failure to comment on any
 18 such requirement. Moreover, it is unlikely that Plaintiffs could allege such an interest in the first
 19 instance as they are not federal employees themselves nor would any additional work
 20 requirement for federal employees be sufficient to create an injury-in-fact. *Republican Nat’l*
 21 *Comm. v. Burgess*, No. 324-cv-198, 2024 WL 3445254, at *5 (D. Nev. July 17, 2024) (rejecting
 22 standing to challenge a requirement “merely because it might create more work”). Defendants
 23 are therefore entitled to summary judgment on Claim V of Plaintiffs’ SAC.

24 **C. The CSRA and FSL-MRS Preclude District Court Jurisdiction Over Plaintiffs’** 25 **Claims**

26 Plaintiffs cannot bring suit in this forum because the CSRA and the Federal Service
 27 Labor-Management Relations Statute (“FSL-MRS”) preclude district court subject matter
 28 jurisdiction over claims regarding the termination of probationary employees.

As Defendants have argued throughout this litigation, *see* Defs.’ Opp’n to Pls.’ Mot. for TRO and Order to Show Cause, ECF No. 33; Defs.’ Supp. Br. on Admin. Channeling, ECF No. 150 (“Defs.’ TRO Opp’n”); Defs.’ Br. re: Additional Relief Available to Union Pls., ECF No. 160; Defs.’ Opp’n to Pl. Washington State’s Mot. for Prelim. Inj., ECF No. 167, the CSRA, which includes the FLS-MRS, provides an “exclusive” scheme for challenges to personnel actions taken against civil service employees and disputes over labor-management relations in the federal workplace. *Elgin v. Dep’t of the Treasury*, 567 U.S. 1, 5, 8 (2012). Through the CSRA, “Congress intentionally provided—and intentionally chose not to provide—particular forums and procedures for particular kinds of claims.” *Am. Fed’n of Gov’t Emps. v. Sec’y of the Air Force*, 716 F.3d 633, 636 (D.C. Cir. 2013) (alterations and quotation marks omitted). Because this “regime is exclusive,” a plaintiff “cannot circumvent [it] by instead bringing suit in district court.” *Id.* at 636–37.

Thus, in *United States v. Fausto*, the Supreme Court held that the CSRA precluded review of a Fish and Wildlife Service employee’s claim for back pay even though the CSRA provided no remedy. *See* 484 U.S. 439, 440–41 (1988); *see also Arron v. United States*, 113 F.3d 1245 (10th Cir. 1997) (expressly applying the CSRA’s exclusive remedial scheme to a probationary employee challenging his termination). Likewise in *Elgin*, the Supreme Court held that, even if a federal employee was raising constitutional claims, the CSRA imposes an “implied preclusion of district court jurisdiction[.]” 567 U.S. at 12; *see also Saul v. United States*, 928 F.2d 829, 835–42 (9th Cir. 1991) (“Congress is better equipped than we to strike an appropriate balance between employees’ interests in remedying constitutional violations and the interests of the government and the public in maintaining the efficiency, morale and discipline of the federal workforce.”); *Veit v. Heckler*, 746 F.2d 508, 510–11 (9th Cir. 1984). The CSRA thus “precludes courts from providing supplemental remedies[.]” *Lampon-Paz v. OPM*, 732 F. App’x 158, 161 (3d Cir. 2018).

Nor can the organizational Plaintiffs or the State of Washington avoid the CSRA’s exclusive scheme by insisting that Congress did not provide states an opportunity to challenge federal employees’ terminations. In authorizing challenges to employment decisions only by

unions representing federal employees, employees, and applicants for employment, Congress deliberately denied review to anyone else. *See Block v. Cnty. Nutrition Inst.*, 467 U.S. 340 (1984). These Plaintiffs thus plainly fall within a class of parties to which Congress purposefully denied the opportunity to seek direct review of federal employees' terminations.

This Court thus lacks subject-matter jurisdiction to adjudicate Plaintiffs' claims. *See, e.g.,* Defs'. TRO Opp'n at 13–17.

II. Defendants Are Entitled to Summary Judgment on Plaintiffs' *Ultra Vires* Claim

Plaintiffs' *ultra vires* claim fails on the law and the record evidence. Courts have recognized that an equitable cause of action for *ultra vires* review may be available in rare instances where, because Congress has failed to provide a cause of action, “the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual.” *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902); *see also Leedom v. Kyne*, 358 U.S. 184, 189 (1958). However, the Supreme Court has expressly held that an *ultra vires* cause of action is not available whenever there is another “meaningful and adequate opportunity for judicial review,” or “clear and convincing evidence that Congress intended to deny ... District Court jurisdiction.” *Bd. of Governors of the Fed. Rsrv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43–44 (1991); *see also Nuclear Regul. Comm'n, v. Texas*, 600 U.S. ---, 145 S. Ct. 1762, 1775–76 (2025); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327–28 (2015).

Ultra vires review is unavailable here. First, Plaintiffs cannot pursue their *ultra vires* claim because it parrots their APA claims. *Compare* SAC ¶¶ 190–201 *with id.* ¶¶ 202–08. Indeed, Plaintiffs contend that OPM exceeded its statutory authority because it “arrogat[e]d to ... itself the authority to direct other agencies' employment decisions” and “Congress did not authorize OPM to hire or fire any federal employees by an agency other than OPM itself.” Pls.' Br. at 11–12; *see also id.* at 14 (repeating this exact same line of argument as to Plaintiffs' APA claims). However, when a plaintiff invokes both the APA and *ultra vires* causes of action, a court should first consider the plaintiff's APA claim. *See Chamber of Com. v. Reich*, 74 F.3d 1322, 1326–27 (D.C. Cir. 1996). Because Plaintiffs' APA claim is identical to their *ultra vires*

1 claim, consideration of their *ultra vires* claims should be avoided. This Court should thus dismiss
 2 Plaintiffs' *ultra vires* claims on this basis alone.

3 Second, even if *ultra vires* review were available, Plaintiffs' *ultra vires* claim would still
 4 fail. To prevail on such a claim, a plaintiff must establish that a government official "acted in a
 5 blatantly lawless manner or contrary to a clear statutory prohibition." *Hindes v. FDIC*, 137 F.3d
 6 148, 164 (3d Cir. 1998); *see Texas*, 145 S. Ct. at 1775 (holding that "nonstatutory review was
 7 available because the agency order at issue was an attempted exercise of power that had been
 8 specifically withheld, and the agency's order violated a specific prohibition in the Act")
 9 (quotations omitted). Mere allegations of constitutional error do not establish *ultra vires* action.
 10 *See Eagle Tr. Fund v. USPS*, 365 F. Supp. 3d 57, 68 n.6 (D.D.C. 2019) (Jackson, J.), *aff'd*, 811
 11 F. App'x 669, 670 (D.C. Cir. 2020) ("[A] constitutional claim is separate from an *ultra vires*
 12 claim."). Nor do claims that "simply involve a dispute over statutory interpretation." *Lundeen v.*
 13 *Mineta*, 291 F.3d 300, 312 (5th Cir. 2002)(quoting *Kirby Corp. v. Peña*, 109 F.3d 258, 269 (5th
 14 Cir. 1997)). Rather, an officer may be said to act *ultra vires* "only when he acts 'without any
 15 authority whatever.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984);
 16 *see also Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689 (1949) (to prevail, a
 17 plaintiff must allege that official is "not doing the business which the sovereign has empowered
 18 him to do"). This is a "very stringent standard," rendering *ultra vires* claims "essentially a Hail
 19 Mary pass" that "in court as in football, ... rarely succeeds." *Nyunt v. Chairman, Broad. Bd. of*
 20 *Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (Kavanaugh, J.).

21 For example, it is well settled that "claims simply alleging that the President has
 22 exceeded his statutory authority are not 'constitutional' claims[.]" *Dalton v. Specter*, 511 U.S.
 23 462, 473 (1994). In *Dalton*, the Supreme Court rejected the proposition that "whenever the
 24 President acts in excess of his statutory authority, he also violates the constitutional separation-
 25 of-powers doctrine." *Id.* at 471. Rather, the Court explained that not "every action by the
 26 President, or by another executive official, in excess of his statutory authority is *ipso facto* in
 27 violation of the Constitution." *Id.* at 472. In reaching this conclusion, the Court carefully
 28 "distinguished between claims of constitutional violations and claims that an official has acted in

1 excess of his statutory authority.” *Id.* (collecting cases). It explained that the Constitution is
 2 implicated only if executive officers rely on it as an independent source of authority to act or if
 3 the officers rely on an unconstitutional statute. *Id.* at 473 & n.5.

4 In this case, Plaintiffs do not allege that either OPM’s regulations or its statutory
 5 authority for promulgating these regulations are themselves unconstitutional; nor have they
 6 alleged that those regulations directly prohibit OPM’s guidance. *See generally* SAC. Dalton’s
 7 reasoning thus controls here and refutes any argument that OPM acted *ultra vires*. *See Ctr. for*
 8 *Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 51–54 (D.D.C. 2020) (rejecting separation-
 9 of-powers claim based on Appropriations Clause under *Dalton* because “[a]t bottom, this is just
 10 an allegation that [executive officials] exceeded their statutory authority”). Indeed, the Supreme
 11 Court very recently reiterated *Dalton*’s reasoning in rejecting an attempt to “dress up a typical
 12 statutory-authority argument as an *ultra vires* claim.” *Texas*, 145 S Ct. at 1776. Like *Texas*, the
 13 present matter concerns “simply” whether Defendants have “exceeded [their] statutory authority”
 14 and “no constitutional question whatever is raised”—“only issues of statutory interpretation.”
 15 *Dalton*, 511 U.S. at 473–74 & n.6 (quotation omitted).

16 Third, the premise of Plaintiffs’ *ultra vires* claim—that OPM has no authority to direct
 17 other agencies’ employment decisions—is incorrect as a matter of law. The CSRA, for example,
 18 expressly authorizes OPM to instruct an agency to separate an employee where there is a
 19 negative suitability determination. *See* 5 U.S.C. § 3301, 5 C.F.R. § 5.3; 5 C.F.R. pt. 731.

20 Finally, contrary to Plaintiffs’ allegations and contentions, the administrative record
 21 shows that OPM in fact did not direct other agencies’ employment decisions as part of the
 22 January 20, 2025, guidance or through any subsequent step. Rather, OPM merely provided
 23 guidance to agencies in light of a presidential directive to reduce the size of the federal
 24 government. *See* AR 332–33; *see also* Exec. Order No. 14,210, 90 Fed. Reg. 9669 (Feb. 11,
 25 2025) (clarifying terms of the hiring freeze). OPM was acting well within its authority under the
 26 CSRA to provide guidance to clarify how agencies should carry out the President’s directive
 27 while still exercising their own authority to hire, retain, and terminate employees. *See, e.g.*,
 28 5 U.S.C. § 1103(a)(7), (c)(2)(A)(i). The record further shows agencies retained ultimate

1 discretion over who to terminate. For example, on February 14, 2025, OPM stated that it was
 2 agencies who were ultimately “work[ing] to review, clean up, and finalize their lists of
 3 probationary employees they wish[ed] to keep, and wish[ed] to terminate, and begin taking
 4 action.” AR 375; *see also* AR 357–58.

5 In fact, Plaintiffs seem to ultimately recognize that it was the agencies responsible for the
 6 terminations, arguing elsewhere in the *ultra vires* claim that the relevant provisions of the CSRA
 7 “do not permit agencies to terminate probationary employees, immediately and en masse, or for
 8 pretextual ‘performance’ reasons[.]” Pls.’ Br. at 12. Yet that is not an argument that OPM acted
 9 *ultra vires*, but rather a dispute with whether the *agencies* themselves followed the CSRA in
 10 terminating probationary employees. In sum, Plaintiffs cannot sustain an *ultra vires* claim based
 11 on the record here.

12 **III. OPM Did Not Violate Its Statutory Authority in Issuing the Guidance**

13 This Court should also grant summary judgment to Defendants on Plaintiffs’ second
 14 claim alleging that OPM “exceeded its own statutory authority and usurped the authority of other
 15 agencies,” and thus exceeded its statutory authority under the APA. Pls.’ Br. at 14. Plaintiffs’
 16 claim finds no support in the record, and neither OPM’s guidance (not its other actions) exceeded
 17 its statutory authority.

18 The CSRA authorizes OPM to “advise[] the President on actions which may be taken to
 19 promote an efficient civil service and a systematic application of the merit system principles,
 20 including recommending policies relating to the ... separation of employees.” 5 U.S.C.
 21 § 1103(a)(7). The statute also charges OPM with helping to “align[] human capital strategies of
 22 agencies with the missions, goals, and organizational objectives of those agencies[.]” *Id.*
 23 § 1103(c)(2)(A)(i). OPM’s January 20, 2025, guidance and subsequent correspondence with
 24 agencies was consistent with its statutory authority, as all it did was give agencies guidance “in
 25 light of the President’s directive to dramatically reduce the size of the federal workforce.” AR
 26 375.

27 Plaintiffs’ primary legal contention is that OPM was not authorized to hire or fire any
 28 federal employees outside of OPM. Pls.’ Br. at 11–12. But that misses the point, because the

administrative record shows that OPM did not direct agencies to terminate employees. Rather, the record repeatedly shows that it was up to the agencies to determine which probationary employees to exempt from terminations and that OPM would not “be in the weeds” of those agency’s decisions. AR 357 (“Agencies are responsible for exempting whomever they want”). In fact, at least one agency declined to fire *any* of its probationary employees. *See, e.g.*, AR 386–88 (U.S. Department of Justice). And when OPM provided guidance to agencies of next steps to terminate probationary employees, OPM specifically noted that it was the agencies that were “work[ing] to review, clean up, and finalize their lists of probationary employees they *wish[ed]* to keep, and wish[ed] to terminate, and begin taking action.” AR 375 (emphasis added). In short, the record shows that, at all times, the decisions about terminations of probationary employees were left in the discretion of the individual agencies, which carried out these decisions as part of a broader Executive-wide effort to reduce the federal workforce.

Indeed, Plaintiffs’ other arguments essentially admit this fact: Plaintiffs contend that the CSRA “do[es] not permit agencies to terminate probationary employees, immediately and en masse, or for pretextual ‘performance’ reasons[.]” Pls.’ Br. at 12. But this is an argument leveled at the conduct of the agencies, not at OPM or its guidance—which is the sole focus of this lawsuit. *See generally* SAC. Accordingly, this Court should grant summary judgment to Defendants on Claim II.

IV. OPM’s Guidance Was Not Arbitrary and Capricious

This Court should grant summary judgment to Defendants on Plaintiffs’ third claim that OPM’s actions were arbitrary and capricious in violation of the APA.⁵

⁵ While Defendants initially conceded that Plaintiffs challenged only final agency action, *see* Defs’ Resp. to Mar. 28, 2025, Order Setting Further Br. Sch., at 2, ECF No. 173, with respect to Plaintiffs’ challenges to OPM guidance, Plaintiffs’ new arguments appear to impermissibly go further. Plaintiffs now assert that they are also challenging OPM’s provision of a template termination letter and OPM’s “‘exemption’ decisions.” But any claims related to the decisions were never pleaded in Plaintiffs’ SAC, and Plaintiffs cannot amend their complaint by way of summary judgment briefing. *Christianson v. United States*, 706 F. Supp. 3d 1057, 1071 (D. Idaho 2023) (“It is impermissible to add a new claim or assert a new legal theory for the first time at the summary judgment stage.”), *appeal filed*, No. 24-232 (9th Cir. Jan. 16, 2024). Moreover, by challenging a more sprawling chain of actions taken by OPM beyond the original guidance, it is questionable whether Plaintiffs are challenging final agency action. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64, (2004) (“The [APA’s] limitation to discrete agency action precludes ... broad programmatic attack[s]”).

1 Under the APA, an action is arbitrary and capricious only if the agency:

2 relied on factors which Congress has not intended it to consider, entirely failed to
3 consider an important aspect of the problem, offered an explanation for its
4 decision that runs counter to the evidence before the agency, or is so implausible
that it could not be ascribed to a difference in view or the product of agency
expertise.

5 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43
6 (1983). “Under the arbitrary and capricious standard, [a court’s] review ... is highly deferential,
7 presuming the agency action to be valid and affirming the agency action if a reasonable basis
8 exists for its decision.” *Sacora v. Thomas*, 628 F.3d 1059, 1068 (9th Cir. 2010). Accordingly, a
9 court’s “[r]eview under the arbitrary and capricious standard is narrow, and [it does] not
10 substitute [its] judgment for that of the agency,” and “[a]n agency decision will be upheld as long
11 as there is a rational connection between the facts found and the conclusions made.” *Barnes v.*
12 *U.S. Dep’t of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011); *see also Fed. Commc’ns Comm’n v.*
13 *Prometheus Radio Project*, 592 U.S. 414, 423 (2021) (“A court simply ensures that the agency
14 has acted within a zone of reasonableness and, in particular, has reasonably considered the
15 relevant issues and reasonably explained the decision.”). “[M]ere policy disagreement is not a
16 basis for a reviewing court to declare agency action unlawful.” *N.C. Fisheries Ass’n, Inc. v.*
17 *Gutierrez*, 518 F. Supp. 2d 62, 95 (D.D.C. 2007).

18 Neither OPM’s guidance nor its other actions were arbitrary and capricious. OPM merely
19 provided guidance to agencies regarding how agencies could act “in light of the President’s
20 directive to dramatically reduce the size of the federal workforce.” AR 375. As part of this
21 process, OPM noted that agencies could ultimately identify which employees they sought to keep
22 and which employees they did not seek to keep. *Id.* And, to aid the agencies who sought to
23 terminate probationary employees, OPM provided them with a “template letter” the agencies
24 *could* choose to use in communicating any termination. AR 369, 375. While Plaintiffs may
25 disagree with the wisdom of OPM’s guidance, they cannot say that there was no reasonable basis
26 for OPM to issue it, particularly given the broader Executive-wide effort to reduce the size of the
27 federal workforce. In fact, OPM’s guidance reiterated what OPM and other agencies had
28 repeatedly said before: that agencies should use the probationary period to evaluate the fitness of

1 probationary employees for continued employment. *See* AR 3–56, 60–116, 324–25.

2 Plaintiffs nevertheless cite four OPM actions as purportedly showing that its actions were
3 “based on an unreasoned and pretextual attempt to characterize these terminations uniformly as
4 being based on employees’ ‘performance.’” Pls.’ Br. at 15. Specifically, Plaintiffs contend that
5 OPM acted arbitrarily and capriciously when it supposedly: (1) “directed agencies to send
6 template termination letters with no individualized statements of reasons and with a statement
7 that employees were being terminated for cause that had no factual basis[;]” (2) “categorically
8 directed agencies to terminate all probationary employees for performance[;]” (3) “categorically
9 directed agencies to retain only their ‘mission-critical’ probationary employees[;]” and (4) used
10 an OPM template letter as “an obvious pretext intended to obstruct appeal and avoid statutory
11 and regulatory reduction-in-force procedures.” *Id.* at 16. This Court should reject each of these
12 arguments because, rather than show that OPM somehow lacked a reasoned basis for its
13 decisionmaking, they merely challenge the wisdom of OPM’s guidance.

14 Plaintiffs’ arbitrary and capricious challenge also fails because their claims are
15 contradicted by the record. Plaintiffs’ first two claims start from an incorrect premise, as
16 Plaintiffs believe that the template letters provided by OPM demanded that the agencies
17 specifically issue letters terminating probationary employees and identify “performance” as the
18 basis. The record shows that OPM did no such thing. Rather, the documents that OPM provided
19 to agencies were “[d]raft letters” or “template[s]” and, Plaintiffs point to no evidence in the
20 record that OPM actually required agencies to use these drafts. *Cf.* AR 369, 375. Moreover,
21 OPM specifically stated that “agencies must identify performance or conduct deficiencies in the
22 notice terminating a probationer,” AR 369, reflecting OPM’s guidance that agencies could use
23 conduct *or* performance as the basis for termination and that agencies had to provide a basis for
24 terminating employees.

25 Plaintiffs’ third and fourth claims also fail to find any support in the record. While
26 Plaintiffs claim that “OPM categorically directed agencies to retain only their ‘mission-critical’
27 probationary employees,” Pls.’ Br. at 16, a review of OPM’s February 14 guidance contains no
28 such directive. Rather, that letter conveyed that “OPM *believes* ‘qualifications for continued

employment’ in the current context means that only the highest-performing probationers in mission-critical areas should be retained.” AR 375. OPM simply conveyed its *belief* that mission critical employees should be retained. Nor did OPM say that “only” such employees should be retained. *See id.* (noting agencies had worked to review employees they “wish[ed] to keep[]”). And finally, while Plaintiffs claim that the template letter was a “pretext intended to obstruct appeal and avoid statutory and regulatory reduction-in-force procedures,” Pls.’ Br. at 16, nothing in the administrative record supports such an assertion. Additionally, the fact that certain agencies chose *not* to terminate probationary employees—and that OPM acknowledged that—further belies the argument that OPM directed a back-end reduction-in-force. This Court should thus grant summary judgment to Defendants on Plaintiffs’ arbitrary and capricious claim.

V. OPM’s Guidance Did Not Constitute a Rule Requiring Notice and Comment

This Court should grant summary judgment to Defendants on Plaintiffs’ fourth claim that “OPM promulgated at least three government-wide ‘rules’ which, pursuant to 5 U.S.C. §§ 1105 and 1103(b)(1), could only be issued by means of notice-and-comment rulemaking.” Pls.’ Br. at 18. This claim fails because Plaintiffs cannot show that OPM’s *guidance* and any further communications related to it were legislative rules subject to the APA’s or the CSRA’s notice and comment requirements.⁶

Under the APA, the notice and comment requirement “subsection does not apply ... to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice[.]” 5 U.S.C. § 553(b)(4)(A). As a result, courts have routinely held interpretive rules do not require notice and comment rulemaking because they “do not have the force and effect of law.” *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 97 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)). So, too, with agency “guidance documents,” which do not need to be “promulgated pursuant to the notice-and-comment procedures of the Administrative Procedure Act” unless they are binding on an agency because they have been

⁶ In any event, as with Plaintiffs’ other claims, their claim that OPM issued a rule that should have gone through notice and comment rulemaking “is ‘of the type’ Congress intended to channel through the CSRA’s exclusive remedial regime.” *Fed. L. Enf’t Officers Ass’n v. Ahuja*, 62 F.4th 551, 565 (D.C. Cir. 2023) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994)).

1 “upheld in an agency adjudication” or have been “endorsed in other agency action having the
 2 force of law.” *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1034, 1041 (D.C. Cir. 2008).
 3 As a result, “unless another statute states otherwise, the notice-and-comment requirement ‘does
 4 not apply’ to ‘interpretative rules, general statements of policy, or rules of agency organization,
 5 procedure, or practice.’” *Perez*, 575 U.S. at 96 (quoting 5 U.S.C. § 553(b)(A)).

6 In determining whether items like guidance documents are substantive “rules” and have
 7 the force of law, the Ninth Circuit has often looked to the “helpful framework” from the D.C.
 8 Circuit’s decision in *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir.
 9 1988). *See League of Cal. Cities v. Fed. Comm’n Comm’n*, 118 F.4th 995, 1012 (9th Cir.
 10 2024). In distinguishing a substantive rule (subject to notice-and-comment rulemaking) from a
 11 general statement of policy (not subject to notice-and-comment rulemaking), the D.C. Circuit has
 12 observed that: “[a] policy statement is one that first, does not have a present-day binding effect,
 13 that is, it does not impose any rights and obligations, and second, genuinely leaves the agency
 14 and its decisionmakers free to exercise discretion.” *McLouth Steel Prods.*, 838 F.2d at 1320
 15 (quotations omitted). In other words, “[t]he question for purposes of § 533 is whether a statement
 16 is a rule of present binding effect; the answer depends on whether the statement constrains the
 17 agency’s discretion.” *Id.* Likewise, the Ninth Circuit has held that “[t]o the extent that [a]
 18 directive merely provides guidance to agency officials in exercising their discretionary powers
 19 while preserving their flexibility and their opportunity to make individualized determinations, it
 20 constitutes a general statement of policy.” *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th
 21 Cir. 1987) (cleaned up). To that end, the Ninth Circuit has looked to whether “[g]uidance
 22 contains a great deal of language suggesting that its directions are mandatory.” *Colwell v. Dep’t*
 23 *of Health & Hum. Servs.*, 558 F.3d 1112, 1126 (9th Cir. 2009). As relevant to this Court’s
 24 inquiry, another court has expressly held that guidance “issued by OPM [that] merely interpret[s]
 25 ... Executive Orders,” does not constitute a substantive rule requiring notice and comment
 26 rulemaking. *Serv. Emps. Int’l Union Loc. 200 United v. Trump*, 420 F. Supp. 3d 65, 77
 27 (W.D.N.Y. 2019).

28 Under these principles, the OPM guidance was not a substantive rule with the force of

1 law and was thus not subject to the APA’s or the CSRA’s notice and comment requirements.
 2 OPM’s guidance reiterated what OPM had previously advised agencies, which was to use the
 3 probationary period “to assess employee performance and manage staffing levels.” AR 335
 4 (citing AR 3–59); *see also* AR 324. While OPM guidance advised agencies to identify
 5 probationary employees, it quite clearly conveyed that it was up to agencies to “determine
 6 whether [probationary] employees should be retained at the agency.” AR 335. In other words,
 7 the guidance stated that agencies had the “flexibility and [the] opportunity to make
 8 individualized determinations,” about whether or not to retain probationary employees. *Mada-*
 9 *Luna*, 813 F.2d at 1013. There was no mandatory directive for agencies to terminate all or even a
 10 sub-set of employees, and OPM’s subsequent communications with agencies reiterated this
 11 point. *See* AR 357 (“Agencies are responsible for exempting whomever they want—they are not
 12 required to exclude people. We have suggested possible categories of exemptions but are not
 13 requiring it. It might not make sense for each agency.”).

14 In arguing otherwise, Plaintiffs assert that “the AR shows that OPM promulgated at least
 15 three government-wide ‘rules.’” Pls.’ Br. at 18. Plaintiffs contend that OPM promulgated rules
 16 when it: (1) directed agencies to prepare lists of probationary employees, determine whether to
 17 retain them, “and to terminate all but their ‘mission-critical’ probationers by February 17[;]”
 18 (2) “purported to redefine[]” employee fitness and qualifications “by instructing all agencies that
 19 ‘only the highest-performing probationers in mission critical areas’ were to be considered fit for
 20 continued employment[;]” and (3) “created a novel process by which agencies could secure
 21 exemptions from OPM’s equally novel mass termination program.” *Id.* Plaintiffs once again
 22 improperly advance claims never pleaded in their SAC. *See* SAC ¶¶ 214–21; *see also*
 23 *Christianson*, 706 F. Supp. 3d at 1071. But even assuming these claims were properly pled, the
 24 record does not support Plaintiffs’ contentions.

25 First, contrary to Plaintiffs’ suggestion, OPM’s January 20 guidance simply echoed prior
 26 guidance about the importance of the probationary period and assessing agencies’ probationary
 27 employees. And Plaintiffs’ assertion that OPM directed agencies to terminate their mission
 28 critical employees on February 14 is not supported by the record. While OPM emailed agencies

1 on February 14 regarding their lists of probationary employees, the record clearly shows that
2 OPM expressly stated that the decision of whether to separate those employees or any
3 employees, at all, was up to the agencies. *See* AR 375 (“agencies have worked to review, clean
4 up, and finalize their lists of probationary employees they wish to keep, and wish to terminate,
5 and begin taking action”). Moreover, OPM did not mandate termination of non-mission-critical
6 employees but rather “asked” for agencies to separate employees it had already identified for
7 termination. *Id.* Like its January 20 guidance, OPM’s February 14 guidance was “written in non-
8 mandatory terms.” *Colwell*, 558 F.3d at 1125.

9 Second, Plaintiffs’ claim that OPM redefined the meaning of employee “fitness” and
10 “qualifications” finds no support in the record. While Plaintiffs argue that OPM advised agencies
11 that “only the highest performing probationers in mission-critical areas should be retained,” *Pls.’*
12 *Br.* at 8 (quoting AR 990), the record shows that this was not a substantive rule, but rather what
13 “OPM believes,” AR 390. OPM did not “instruct[] all agencies,” to follow this belief or mandate
14 that agencies retain only those probationers. *See* AR 375 (noting that agencies had identified
15 “employees they wish to keep[]”). Nor do Plaintiffs identify any record evidence that OPM
16 changed the meaning of any operative regulation. To the contrary, by noting that agencies had to
17 “identify performance or conduct deficiencies in the notice terminating a probationer,” AR 369,
18 OPM was following existing regulations, *see* AR 390 (noting this identification was required
19 under 5 C.F.R. § 315.804).

20 Finally, Plaintiffs’ claim that OPM created an exemption process that constitutes a
21 substantive rule finds no support in the record. While OPM used the word “exemptions,” when
22 agencies sought OPM’s counsel on what probationary employees to terminate, the record does
23 not support Plaintiff’s claim that OPM somehow created a binding process for agencies’
24 personnel actions. There is nothing in the record showing that OPM ever overruled an agency’s
25 decision not to terminate employees, AR 382, and OPM made clear that it would not “be in the
26 weeds” of whatever employees an agency chose to retain or not retain. AR 357. Those decisions
27 were “up to each agency” and while OPM had “suggested possible categories of exemptions [it
28 did] not require[e] it.” *Id.* The record shows that, at all times, agencies retained “flexibility and

1 [the] opportunity to make individualized determinations.” *Mada-Luna*, 813 F.2d at 1013. Thus,
 2 OPM’s guidance and subsequent actions were not substantive rules subject to notice and
 3 comment requirements.

4 **VI. Plaintiffs’ Requests for Relief Are Improper**

5 Defendants have shown that this Court should grant summary judgment to Defendants on
 6 each of Plaintiffs’ claims. But even assuming *arguendo* that Plaintiffs are entitled to relief on any
 7 of their claims, this Court should reject Plaintiffs’ requests for relief.

8 As a preliminary matter, Plaintiffs’ request for “declaratory judgment that OPM lacked
 9 the authority to direct other agencies to terminate their probationary employees,” Pls.’ Br. at 18,
 10 is entirely unnecessary. The parties have consistently agreed that OPM does not have the
 11 authority to direct the mass termination of probationary employees, and OPM’s own revised
 12 guidance further reiterated this fact. *See, e.g.*, ECF No. 78; ECF No. 167 at 16.

13 Plaintiffs’ remaining requests for a panoply of measures “as is necessary to fully unwind”
 14 any alleged “mass termination directive,” Pls.’ Br. at 19, are also unwarranted. Plaintiffs’
 15 requested relief would improperly require the Court to engage in sprawling “corrective actions”
 16 that go far beyond vacating the guidance and would inappropriately involve the Court in
 17 oversight of the employment decisions of agencies *other than OPM*. *Id.* at 20. Among other
 18 things, Plaintiffs seek an order of the Court directing: (i) all relief defendant agencies to modify
 19 each employee’s SF-50s to remove any reference to performance-based terminations; (ii) all
 20 relief defendant agencies to modify their previous letters issued to probationary employees as
 21 part of the Court’s April 18 order; and (iii) the National Oceanic & Atmospheric Administration
 22 (“NOAA”) to not retroactively terminate its probationary employees. *Id.* at 20–23. Each of these
 23 requested remedies goes far beyond unwinding any unlawful action by OPM. Each would
 24 instead require this Court to enmesh itself in the personnel affairs of the various relief defendant
 25 agencies, which the Court has already rejected. *See* Tr. of Apr. 9, 2025, Hrg. 32:16–17 (“I don’t
 26 like being in the position where I’m telling an agency to make their personnel decisions.”); *id.*
 27 32:22–23 (“So should it go away now that the agency – they know clearly well they have the
 28 right to decide, not OPM.”).

1 First, Plaintiffs’ requested relief would improperly disturb the Executive’s traditional
 2 “latitude in the dispatch of its own internal affairs.” *Sampson v. Murray*, 415 U.S. 61, 83 (1974)
 3 (citation and internal quotation marks omitted). And courts are generally wary of providing
 4 broad injunctive relief that disturbs the personnel decisions of an employer. *See, e.g., Bayer v.*
 5 *Neiman Marcus Grp., Inc.*, 861 F.3d 853, 865 (9th Cir. 2017) (“[A] former employee has no
 6 claim for injunctive relief addressing the employment practices of a former employer absent a
 7 reasonably certain basis for concluding he or she has some personal need for prospective
 8 relief.”); *see also, e.g., Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (“The CSRA’s
 9 elaborate remedies show that judicial interference in federal employment is disfavored, whether
 10 the employee requests damages or injunctive relief.”).

11 Second, because Plaintiffs’ requested relief also does nothing to “unwind” any allegedly
 12 unlawful action by OPM, it is therefore burdensome and overbroad. *See Califano v. Yamasaki*,
 13 442 U.S. 682, 702 (1979) (“injunctive relief should be no more burdensome to the defendants
 14 than necessary to provide complete relief to the plaintiffs”); *Lamb-Weston, Inc. v. McCain*
 15 *Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (“Injunctive relief, however, must be tailored to
 16 remedy the specific harm alleged.”).

17 Plaintiffs’ request for relief that “the relief defendant agencies ... be further ordered to
 18 promptly update each terminated probationary employees’ personnel files, including employee
 19 status change forms called SF-50s, to remove any references to performance-based
 20 terminations,” Pls.’ Br. at 20, highlights this overreach. If probationary employees have
 21 remained terminated even after this Court’s prior orders and OPM’s revised guidance—and as a
 22 result have their SF-50s coded as showing terminations—that is clearly a decision reached by the
 23 agencies independent of OPM. *See* Tr. of Apr. 9, 2025, Hrg. 32:23–33:1 (“But if the agency
 24 decides they’re going to fire those people, isn’t that the whole point? Rightly or wrongly, the
 25 agency – it’s not the original lawsuit. The original lawsuit was OPM.”). Having the relief
 26 defendant agencies alter an employee’s SF-50 does not unwind any unlawful decision by OPM.
 27 Rather, Plaintiffs’ proposed relief would have the Court police the agencies’ choices to keep
 28 certain probationary employees terminated even after it has become abundantly clear that

1 agencies are exercising their own discretion on whether to retain or terminate probationary
 2 employees. *See, e.g.*, SAC ¶ 142 (noting that NSF reinstated terminated probationary employees
 3 in March 2025).⁷

4 A similar issue exists with Plaintiffs’ requested relief to have “[e]ach relief defendant ...
 5 required to state in further corrective letters, without hedging or qualification, that ...
 6 probationary employees were not terminated for performance-based reasons.” Pls.’ Br. at 22.
 7 Once again, Plaintiffs ask the Court to alter decisions made by agencies independent of any
 8 decision by OPM. Plaintiffs specifically take issue with some letters issued by agencies to
 9 comply with this Court’s April 18 order. In particular, some letters informed terminated
 10 probationary employees that their terminations were not performance-based while stating that the
 11 agency disagreed with the Court’s April 18 order. *See, e.g.*, Decl. of Helen Wooden-Aguilar ¶ 4,
 12 ECF No. 216-16. Yet, Plaintiffs do not suggest—nor could they—that these agency statements
 13 are ultimately attributable to OPM, let alone the OPM guidance initially challenged in this
 14 lawsuit. Therefore, altering that language would not unwind anything that Plaintiffs challenge as
 15 allegedly unlawful in *this* lawsuit.⁸

16 Plaintiffs’ last request for relief is the furthest afield from the scope of their Second
 17 Amended Complaint. Plaintiffs ask the Court to prohibit retroactive terminations of probationary
 18 employees by NOAA and make any affected “employees ... whole for any out-of-pocket
 19 medical expenses incurred as a result of the retroactive terminations.” Pls.’ Br. at 23. But
 20 Plaintiffs seek relief wholly untethered from OPM’s original guidance. Instead, they seek to alter
 21 independent choices made by one of the relief defendant agencies. Plaintiffs all but admit this
 22

23 ⁷ Even assuming their request was proper, Plaintiffs offer no suggestion of what defendant
 24 agencies should do in terms of re-coding SF-50s if the probationary employees remain
 25 terminated. In fact, agencies may have limited options in how to code a probationary employee’s
 termination in a SF-50. *See* 5 C.F.R. § 315.804 (noting termination of probationary employers
 may be done either “for unsatisfactory performance or conduct”).

26 ⁸ That the agencies chose to use “hedging” language does not violate this Court’s April 18
 27 order despite Plaintiffs’ assertions to the contrary. Pls.’ Br. at 22. The Court’s order only
 28 required a specific written statement to be conveyed by “relief defendant agencies who used the
 OPM template termination notice[.]” *AFGE*, 2025 WL 1150698, at *15. It did not go any further,
 and agency decisions to caveat their statements are understandable given the potential for
 assertions of liability in any lawsuits brought by terminated probationary employees before the
 MSPB.

1 problem, noting, by use of the passive voice, that the NOAA employees were: “originally
2 terminated on February 27 as part of the mass termination;” “were briefly reinstated effective
3 March 17 in compliance with the TRO in *Maryland v. U.S. Department of Agriculture*,” and
4 “were later re-terminated on April 10, *retroactively to February 27*, after the Fourth Circuit
5 stayed the *Maryland* district court’s order.” *Id.* at 22. That chain of events demonstrates that the
6 retroactive termination of NOAA employees was the independent judgment of the Commerce
7 Department, not OPM. OPM was not involved with this decision, and Plaintiffs’ requested relief
8 does not unwind any unlawful action by OPM. *See Pac. Radiation Oncology, LLC v. Queen’s*
9 *Med. Ctr.*, 810 F.3d 631, 633 (9th Cir. 2015) (“When a plaintiff seeks injunctive relief based on
10 claims not pled in the complaint, the court does not have the authority to issue an injunction.”).

11 In sum, to the extent that this Court grants any relief, it should be far more limited than
12 that sought by Plaintiffs.

13 CONCLUSION

14 This Court should grant summary judgment for Defendants on Claims I–V of Plaintiffs’
15 Second Amended Complaint and deny Plaintiffs’ motion for summary adjudication.
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Respectfully submitted,

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